CCASE:
MSHA V. HARRIIMAN COAL
DDATE:
19921105
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 92-305
	:	A.C. No. 36-06440-03509
v.	:	
	:	Goodspring No. 1 Mine
HARRIMAN COAL CORPORATION, Respondent	:	East and West

DECISION

Appearances: Gayle M. Green, Esq. and Linda Henry, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania; Mr. Ronald Lickman, International Anthracite Corporation, Pottsville, Pennsylvania, pro se.

Before: Judge Weisberger

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary (Petitioner) alleging a violation by the operator (Respondent) of 30 C.F.R. 77.410. Pursuant to notice the case was heard in Reading, Pennsylvania, on July 14, 1992. Howard Joseph Smith, testified for Petitioner, and Ronald Lickman, testified for Respondent.

Finding of Fact and Discussion

On September 19, 1991, Howard Joseph Smith, an MSHA Inspector, inspected Respondent's Penag Goodspring Mine. He observed a Caterpillar Model 988 front-end loader in operation. He testified that the "backup alarm was not working", and that "there was no audible alarm" (Tr.20). He issued a citation alleging a violation of 30 C.F.R. 77.410, which in essence, provides that front-end loaders shall be provided with a warning device that, "(1) gives an audible alarm when the equipment is put in reverse; ... ." Respondent did not offer any evidence to contradict the testimony of Smith that on the date he issued the citation the alarm on the loader in question was not functioning. Accordingly I find that the Respondent herein violated Section 77.410.

According to Smith, the violation herein is to be characterized as "significant and substantial". He explained that this type of does loader not have a mirror(Footnote 1), and that there is a blind spot immediately behind the loader. According to Smith, the tires are almost 6 feet in height, and hence, it is not possible for an operator to see the immediate 12 to 15 feet behind the loader. He further testified that on the date he issued the citation, in addition to employees operating various pieces of heavy equipment, he observed a mechanic, Michael Dent, approximately 15 to 18 feet away from the loader. In essence, he concluded that because the reverse alarm did not function, an injury was reasonably likely to have occurred due to the blind spot behind the loader. He also concluded that, given the weight of the machine, i.e. approximately 20 tons, should the loader run over an individual, serious injuries would result.

In Mathies Coal Co., 6 FMSHRC 1 (January 1984), The Commission set forth the elements of a "significant and substantial" violation as follows:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (l) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and, (4) a reasonable likelihood that the injury in question will be of a reasonable serious nature. (6 FMSHRC, supra, at 3-4.)

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury". U.S. Steel Mining Co., 6 FMSHRC 1834, 1336 (August 1984).

Ronald Lickman, Respondent's President testified that he

_____

1Although Respondent in its brief alleges that mirrors are standard equipment an this loader, Respondent did not adduce any evidence at the hearing with regard to the existence of a mirror on the loader.

normally visits the site in question approximately once a week. He indicated that Dent is a mechanic/welder who spends approximately 80 percent of his time in a shop welding buckets. He indicated that the only time Dent works at the face where the loader in question operates, is when he has to repair or observe a piece equipment. In general he indicated that there were no new employees on the site.

Considering all the above I conclude that the record establishes a violation of Section 77.40 supra, which contributed to the hazard and of a person being hit by the loader operating in reverse. Also given the blind spot which makes it impossible for the operator of the vehicle to see the immediate 15 to 18 feet behind the loader, and the fact that at least one miner works, at times, in the area, I conclude that there was a reasonable likelihood that the hazard contributed to by the violation herein would result in a injury producing event. Accordingly, I conclude that it has been established that the violation herein was significant and substantial.

I find that the violation herein was serious as it could have resulted in severe injuries. There is no evidence as to how long a period of time prior to the date of the citation the alarm was not in operation. Lickman indicated that operators of loaders usually pull the alarm, but that he would fire an employee for disconnecting the alarm. I conclude that Respondent's negligence herein was not more than ordinary.(Footnote 2) Taking into account the seriousness of the violation as well as the remaining statutory factors stipulated to by the parties I conclude that a penalty of $100 is appropriate for the violation found herein.

ORDER

It is ORDERED Respondent shall, within 30 days of this decision, pay a civil penalty of $100.

Avram Weisberger
Administrative Law Judge

_____

2There is no merit to Respondent's argument that, in essence, management shall not be liable for the negligence of its employees. The law is well settled that, to the contrary, an operator is liable for the violations of the Act committed by its employees, (Western-Fuels Utah, 10 FMSHRC 256 (1988); Sewell Coal Co v. FMSHRC, 686 F.2d 1066 (4th Cir. 1982); Allied Products Co. v. FMSHRC 666 F.2d 890 (5th Cir. 1982)).

~1799
Distribution:

Gayle M. Green, Esq., and Linda Henry, Esq., Office of the Solicitor, U.S. Department of Labor, 3535 Market Street, 14480 Gateway Building, Philadelphia, PA 19104 (Certified Mail)

Mr. Ronald Lickman, President, International Anthracite Corporation, 101 N. Center Street, Suite 309, Pottsville, PA 17901 (Certified Mail)

nb